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No. 93-542

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1993

In the Matter of

PARUL P.,

A Child Under Eighteen Years of Age Alleged to be Abused by RASHMI, P.,

Petitioner,

- against -

COMMISSIONER OF SOCIAL SERVICES,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

1. In this civil child protective proceeding under Article 10 of the New York Family Court Act, does the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, comport with due process, assuming the issue is preserved for review?

2. Did the state courts properly reject petitioner's claim that he was denied a fair trial?

3. Are the rules applicable to the definiteness of indictments, and under Brady v. Maryland, 373 U.S. 83 (1963), inapplicable to a civil proceeding pursuant to Article 10 of the Family Court Act?

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STATEMENT OF THE CASE

By petition dated April 14, 1989, the Commissioner of Social Services of the City of New York ("Commissioner") commenced this proceeding under Article 10 of the Family Court Act, alleging that

petitioner (respondent below) Rashmi P. committed or permitted sex offenses against his daughter Parul P. Specifically the petition states that

> 1. On 4/1/89, 4/6/89 and 4/7/89 SSC received reports that on three occasions the [petitioner] touched the child on the buttocks and had her fondle his penis. One report indicated that the [petitioner] digitally molested the child's anus.
>
> 2. [Petitioner] father admitted to touching the child's buttocks and placing her hand on the penis on at least three occasions.

At the time of the filing of the petition, Parul was nine years old.

Two of the reports referred to, DSS-2221 reports of suspected child abuse, were subsequently received in evidence as

Commissioner's Exhibits 1 and 2 (B7-14).[1] Parul's birth date is stated in both as March 31, 1980. In one, dated April 6, 1989, Mrs. G. Gelber, a member of the school staff, reported that "at least three times father has had child come into bed with him and hold his penis Fa[ther] has also fondled her buttocks. This occurs in the morning after mo[ther] has gone to work but before ch[ild] goes to school. Mo[ther] was unaware of Fa[ther's] actions."

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[1] This appeal was perfected on the original record. Transcript citations preceded by "A" refer to pages of the hearing held on October 16, 1989; B: November 13, 1989; C: February 15, 1990 first transcript; D: February 15, 1990 separate "excerpt"; E: February 26, 1990; F: April 19, 1990; G: May 21, 1990; H: June 4, 1990; and I: June 6, 1990; J: January 17, 1991 (dispositional).

The second report, dated April 7, 1989, was made by Esperanza Ruiz-Diaz, a social worker at Elmhurst Hospital in Queens (Pet. Exh. 1; B9-12). It stated that

> Mo[ther] brought ch[ild] to Ped ER for exam due to FA[ther's] sex abuse of Parul, Fa[ther] digitally molested Parul in her anus and had her masturbate him to orgasm. This occurred on at least three occasions. Mo[ther] was at work and unaware.
>
> Mo[ther] is ambivalent about situation. Mo[ther] states she trusts her husband and states Fa[ther] "didn't really hurt her". By that, Mo[ther] meant ch[ild] was not penetrated vaginally.

Petitioner's counsel served a demand for a bill of particulars on the Commissioner. Counsel sought the "Exact date", the "Exact Time of day", the "Exact location address", the "Exact room in location", the identity of all

"person(s) present," and an "Exact Description of the alleged offense," for each "occasion of alleged abuse."

The Commissioner responded with a verified bill of particulars on June 30, 1989. In it, the Commissioner stated that the exact dates of the instances of abuse were not known "due to the tender years of the child." The Commissioner stated that although the "exact time of day is not known," the child had stated that "the incident occurred in the morning hours." The Commissioner also identified the location and room where the abuse occurred and detailed the nature of the abuse.

A fact-finding hearing commenced on October 16, 1989, and continued on November 13, 1989, and, in 1990, on February 15, February 26, April 19,

May 21, June 4, and June 6. The Commissioner called Geraldine Gelber, a school social worker; Faith Housen, a caseworker, and Dr. Don J. Lewittes, Ph.D., a validator. Petitioner did not testify nor did he call any witnesses on his behalf.

Ms. Gelber first spoke to the daughter, Parul, on April 6, 1989 (A2-3). Parul had been brought to her office to speak with her after she had disclosed several sexual incidents involving her father (A2-6).

Parul told Ms. Gelber that in the mornings, her mother, a nurse's aide, left for work very early (A5-6, A27-29, A34-35). On three or four occasions, Parul's father had asked Parul to come into his bed with him (A5-6, A27-29, A34-35). Petitioner had Parul hold his

penis, while he felt her "bottom" (id). Parul was happy when, as sometimes happened, an uncle stayed with them, because then her father would not do these things (A7).

Parul was upset in discussing these incidents (A6-7). Ms. Gelber did not discuss the incidents in detail with Parul because she did not want to put her through it, and Parul would be talking with the Bureau of Child Welfare (A5-9). Ms. Gelber understood the events to have taken place at least some months before, although children of that age, approximately nine years old, do not have a good sense of time (id.; A15-16, A34-35).[2] Parul had also mentioned another

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[2] While petitioner wanted a more precise time designation, the court credited the Commissioner's representation that the (continued...)

incident in which a friend of her father's, the building superintendent, had done something with another child (A22).

Ms. Gelber called the Child Abuse Hotline and Mrs. P., Parul's mother. Although Ms. Gelber had asked both Mr. and Mrs. P. to see her the next day, only Mrs. P. showed up at first, and Ms. Gelber discussed the matter with her (A7-8).

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[2] (...continued)
time given was as precise as possible, and advised petitioner's attorney that he could probe the time of the event on cross-examination, as in fact he was allowed to do fully. See A5-6, A38-41, A27-29, A16-21. The court also directed that petitioner's counsel be given access to the Department of Social Services' case file (A42-43) and petitioner has never claimed that that direction was not fully complied with.

About an hour after Mrs. P. left, Mr. P. came to see Ms. Gelber; Ms. Gelber knew it was Mr. P. because he identified himself then, but she also identified him at the hearing in court (A8-9). Petitioner said to her that "what had been said to me was true" (A8-9, A34-35). Parul's precise allegations were not discussed between them, and Ms. Gelber did not repeat to petitioner what Parul had told her, nonetheless, petitioner said that he was not happy that "it" happened, and asked Ms. Gelber not to report it because he was concerned about people at his job finding out (A9, A11). Petitioner also said that "it had not happened in a while and he was very sorry it happened," consistent with what Parul had said (A10-11).

That day or possibly the next, Ms. Gelber spoke with Parul again, telling her what she had said to the parents (A12-14). Parul said that she had wanted to tell her mother and wanted her to know, but had not wanted to tell her mother herself (A12).

Ms. Gelber then explained to Parul that someone would be coming to investigate and ask questions (A12).

Sometime later, when Parul had become more comfortable with her, Parul told Ms. Gelber that a friend of her father's, the building superintendent, had also done something to her: he had pushed her panties aside when she was wearing a dress, and put his tongue on her vagina (A14-15, A31-32).

Faith Housen, a caseworker, spoke with Parul in her home on April 6, the

same day the first report of suspected abuse was telephoned in (B7-B21).

Parul told her that a teacher at school had shown them a movie about being touched in areas where they are not supposed to be touched (B21-22). In response to the teacher's questions about whether the children had been touched, Parul told her teacher that "over a year ago", on three separate occasions, her father held her hand and forced her to touch his penis, in the morning, after her mother had gone to work (B21-22). It had happened in the bedroom, which when Ms. Housen saw it had Parul's bed right next to her father's (B22, B31-32). A cousin who sometimes stays with them stays in a separate room (B31-32). Parul said that petitioner had been wearing his pajamas, and Parul had been wearing her

nightgown (B21-22). The events occurred roughly a year before Parul talked with Ms. Housen, but Parul did not place the incidents with reference to birthdays or other reference days (B30-31). Ultimately, Parul told him that if he did not stop this, she was going to tell her mother, and petitioner did not do it after that (B22, B33, B37).

Ms. Housen had asked Parul whether she knew the difference between telling the truth and lying, and Parul had said that she did, and would not lie about this (B22-23).

Ms. Housen had had two interviews with Parul, one roughly 45 minutes long, the other 20 to 30 minutes long (B63). The interviews were consistent (id.).

Thereafter, on April 10, Ms. Housen received a telephone call from a man

identifying himself as petitioner, and asking if she was Ms. Housen (B40-B41). He then identified himself as Parul's father, Mr. Rashmi P. (B24-25, B40-41, B71-72). Ms. Housen asked him about the abuse report, and he admitted to her that, as she described, he had held Parul's hand to his penis on three occasions (B24-25, B27, B43-44). He said that he was sorry for what had occurred, and would be willing to cooperate with the caseworker and come in for an appointment (B27). It is true that the only way Ms. Housen knew it was petitioner was by what he said (B70-B71). Ms. Housen made a written note of the call in her case record (id.).

Petitioner told Ms. Housen that he had just been let out of jail (B27). She thought that the call occurred in the

morning (B27). However, she had also called someone else, Mr. P.'s brother, seeking temporary placement of Parul with a relative, on the same day and she thought that call was in the afternoon (B27-28, B73-79). Ms. Housen did not talk to petitioner again, because she subsequently learned that he had an attorney, and she thought she should not talk to petitioner directly (B27-28).

The Commissioner then called Parul herself, requesting with the law guardian that the child's testimony be taken in chambers, out of petitioner's presence (B79-85). Upon the objection of petitioner counsel, made after conferring with petitioner, the court denied the application that the testimony be taken outside of petitioner's presence, apparently because the law guardian had

not made it on written papers and no supporting evidence from a therapist had been presented (id.).

Accordingly, petitioner was in the courtroom when Parul was called to testify (B87-88). Parul was able to answer only by nodding her head, and nodded yes that she wanted her mother to stay in the courtroom too (B86). Parul nodded yes to the court's question whether she was scared in any way (B87). Parul then started crying (B88).

The court terminated the examination, and out of the mother and child's presence observed that Parul was "extremely frightened and began to cry" (B88).

The court suggested therapy, and requested a report on whether Parul could

testify without psychological damage if she were to be recalled (B89-B90).

Petitioner's counsel objected, stating that he thought that Parul had testified before in a criminal case against petitioner, but it appeared that that testimony had been on video (B90).

Petitioner's counsel also objected to Parul receiving any therapy, asserting, notwithstanding Parul's crying, that it was purely a delay-tactic (B91-92). The other counsel disputed that point, and based upon the law guardian's application the court ordered therapy before the child testified for the Commissioner (B95-B96).

After Parul was sent for therapy the Commissioner decided not to call the child to testify because it would be too traumatic for her (C3-C7, F5-6). When

petitioner complained that he wanted to cross-examine the child the Court left open to the possibility of petitioner subpoenaing Parul, subject to a motion to quash (C9-11).

The Commissioner called **Dr. Donald Lewittes**, who was subject to extensive voir dire by petitioner and the court (C12). Dr. Lewittes is licensed as a clinical psychologist in the State of New York. He has advanced training in the area of sexual abuse (C12-C13). At the time of the hearing, he was in private practice as a clinical psychologist.[3]

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[3] Since receiving his Ph.D., he has been Chief Psychologist at South Nassau Community Hospital, the Project Director of the Nassau Coalition of Child Abuse and Neglect, and supervisor of a Justice Assistance Act grant to train professionals in investigating and understanding child sexual abuse (C13-14; C46-50). He has also served as a (continued...)

Dr. Lewittes had been treating sex-abused children since 1977 (C59). At the time of the hearing, he had seen well over 1000 patients; including 400-500 children, and over 100 children involved in allegations of child sexual abuse (C14).

Dr. Lewittes makes a diagnosis based upon what the child says, how the child behaves, and the child's emotional stance, assessing whether the child has the distinct characteristics consistent with children who have been determined to be sexually abused (C29-30, C40-41).

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[3] (...continued)
consultant to the Suffolk County Department of Social Services and the City Commissioner (C13). Dr. Lewittes has published papers in academic journals on the topics of human sexuality, pedophilia and child sex abuse (C20-21).

In interviewing a child, Dr. Lewittes does a brief cognitive assessment, and determines whether the child can understand the difference between truth and falsehood, reality and fantasies, and waking and sleeping (C52). He also assesses the child's intellectual development (id.). Dr. Lewittes obtains a history from the child and tries to obtain an understanding of the family dynamics (id.).

During the interview, Dr. Lewittes then tries to ascertain whether the child has symptoms or behavior consistent with post-traumatic stress syndrome, and in particular whether the child demonstrates the five phases, outlined by Dr. Sgroi, as a consistent pattern of behavior of children shown to be sexually abused, i.e., the engagement phase; the

intermission phase; the secrecy phase; the disclosure phase; and the suppression stage, each of which Dr. Lewittes described as some length (C52-53; D2-5). In that regard, Dr. Lewittes tries to evaluate from the child's free recall whether the child has a memory upsetting to him or her, and ascertains whether the child has been in contact with sexually stimulating media that might effect the child's interview (id.).

The court qualified Dr. Lewittes as an expert in clinical-psychological and child sexual abuse, including therapy (D2).

After being qualified as an expert, Dr. Lewittes reexplained in detail his protocol and the various phases of Child Sex Abuse Syndrome, noting in particular the anxiety and need of a child

ultimately to disclose a familial sexual event that the perpetrator directly or subtly pressures the child to keep secret (D2-7). Following that disclosure, there is frequently, "more commonly than not", a recantation phase, which (D6-7):

> usually occurs because the relationship the child has both with the perpetrator and other family members often leads to consequences which often force the child emotionally to feel like they can't go further and testify or in public continue to make the allegations they're making. So in the suppression stage there is often an active attempt by, for example, a spouse or other members of the family such as grandparents if they're available, to tell the child, in essence, to retract, to recant, to suppress their testimony because the loved family member is in some way seen by the rest of the family as being put in jeopardy, and the attitude often in the suppression stage is that if the child would only just take back their allegations then the family could re-define itself in a more historically typical

> fashion, the outside intervention agencies will go away, the outside legal consequences will fall and that the family can go back to what they consider the more normal life-style....

Thus, according to Dr. Lewittes, "more typically than not", children sexually abused by a family member (D7):

> will take back what were their original allegations and come up with some form of recantation or retraction, such as, "I lied" "I don't remember", or, "I made it up", or, "It was a dream", or, "It never happened", or, "Somebody told me to say it", or something along those lines.

Dr. Lewittes interviewed Parul P. twice, on February 3 and February 9, after she had been referred to him by the Commissioner (D8-9).

At the first meeting, Parul stated that she had made allegations to a number of people that her father had sexually

touched her, taking her hand and placing it on his penis, and placing his hand on her "butt" (D10). Then, testified Dr. Lewittes (D10-13):

> [S]he stated to me that she had been thoroughly convinced that these events had, indeed, occurred for a long period of time, that she had held onto these events for over a year, that she was uncomfortable in discussing these events because she was afraid of what her mother's reaction would be. I asked her what she was afraid of. She told me she was afraid that the mother would in some way not believe her. I think Parul stated something to the effect that her mother would ask the question, "How could a good man like your father do something like that?" Stating that she was frightened of her mother's reactions and that she was afraid that the mother would not believe her, she held onto it for approximately a year. She said that eventually she felt the need to disclose it and did so in a school setting and continued to maintain these allegations consistently, she told me, to a number of different people,

including a school social worker, I think she told me her school principal and also to her official teacher. She outlined what she consistently told people what she believed to be a truthful story of the events that had occurred to her with her father. She stated to me she went to a court hearing and following the court hearing she came home and she thought very hard about what she was saying and she decided that what she had reported was really a dream. She told me she was frightened of the court proceedings, that she was extremely upset by them. She also related to me that she was upset that her father had been removed from her home. She stated she felt responsible for that. Based upon her allegations, she also stated she was afraid her father can be sent to jail, and she told me she did not want these things to happen to him, and she continued to maintain to me that, indeed, all of these initial allegations were the product of a dream. I asked her more details about the dream, for example, I asked her, could she remember which hand her father had taken when he placed it on his penis, and she was able to readily answer

that he took her right hand and placed it on his penis. I asked her the details, could she remember whether or not her father's hand had actually touched the skin of her butt or whether she knew or whether or not it had touched on top of or inside of her. She readily answered that she knew that her father touched underneath her nightgown, touching her skin, and that he did not insert his finger into her buttocks. I asked other detailed questions about what the nature of the events were, such as where she was when the father did this touching. She stated she was in bed when he touched her. I asked her the time of day. She said it had been following her mother's leaving for work which she described as in the early morning hours and that she stated to me that she had no other dreams of any other man ever touching her; she had no other experience of any other man touching her; she had viewed no explicit sexual material of anybody else doing the things she had reported to me, and she also reported to me that she was very upset at these interactions; she did not enjoy them at all and she was very concerned and she had asked herself the question,

"How could her father who she loved have done such a thing to her?", because she basically said to me she herself had difficulty reconciling the man she loved doing this to her.

Q. Did you find her reaction to be unusual?

A. In my professional opinion, I felt that her reactions were highly consistent with other children which I examined which have, indeed, been found to be sexually abused within a familial setting, the perpetrator having been the father and the child being the daughter; that her reactions of feeling traumatized, feeling upset, feeling anxious, feeling conflicted about admitting these things, feeling conflicted about implicating a beloved parent figure I found to be consistent with my own professional experience, reading the literature and also my own examinations of children.

Dr. Lewittes' second interview with Parul, on February 9, was similar (D15-18).

Dr. Lewittes observed that Parul's description of the events as a dream was inconsistent in character and style with the way children talk about actual dreams; instead, the dream story was offered as an explanation rather than being an actual dream (D20). Parul's dream story was consistent with the suppression or recantation phase of intra-familial child sex abuse syndrome, where a child retracts under emotional stress, fear and pressure, and needs to come up with some sort of alternative explanation for what was initially stated, frequently and consistently, as fact (D18, D6-7).

Indeed, the way Parul had said it, Parul (D20-21)

> used the word -- she made a decision following the court proceeding. She wasn't able to

> detail to me what the court proceeding was, who the people in the court were, whether it was the Family Court or any other kind of court, and she discussed being extremely upset and frightened by the court process. She identified the fear, the upsetment as preceding going home, thinking hard and making a "decision" that rather than continue to make the allegations that what she had really experienced was a dream and not, indeed, a fact.

The extensive cross-examination of Dr. Lewittes by petitioner's counsel occupies almost the entirety of four of the remaining fact-finding transcripts from February through June, 1990.

Initially, Dr. Lewittes told petitioner's counsel that he would be glad to produce his notes, and tape recordings of 99% of his interview with Parul (D24, E26-30) and, as petitioner's counsel later conceded, Dr. Lewittes did

produce them to the judge in the criminal proceeding in which the same law firm represented petitioner -- after petitioner's counsel served him with that subpoena while he was on the stand in the Family Court (E57-59, H-8). Since the Commissioner objected to their production (D24), the Family Court judge instructed petitioner's counsel to subpoena them if he wanted them, subject to the Commissioner's and the law guardian's motion to quash. Other than a belated attempt to subpoena them after days of cross-examination -- which called for their production on the wrong day, a date when the court was not scheduled to be in session on this case (H13) -- there is no indication that petitioner subpoenaed the tape to Family Court. Nor did he pursue any motions to compel or for contempt

although -- without evidence -- he contended that his subpoenas had not been honored (H8: counsel concedes Lewittes sent a copy of the tape to the judge in the criminal proceeding); cf. G5-6 (claim that Dr. Lewittes did not appear at Supreme Court in response to subpoena).

Petitioner's counsel tried to suggest that the superintendent, petitioner's friend, had abused Parul, and that that abuse in a different manner by a different person was the abuse detected by Dr. Lewittes. Parul had not discussed with Dr. Lewittes that she had been abused by the superintendent. However, Dr. Lewittes explained that while any sex abused child may have anxiety, depression and trauma (E9-10), intra-familial sex abuse syndrome, that displayed by Parul, has different

characteristics from sex abuse by a non-family member with whom a child might generally otherwise have a relationship of love and trust (D33-35). Parul displayed "very significant" symptoms that are "highly identifiable" with the intra-familial child sex abuse syndrome (E53-56).

Specifically, while a non-family abuser may be extremely rough and brutal to a child, secrecy and the resulting stresses imposed by a parental abuser may not be present (id.). The child may not have the same fear of disbelief, or fear of one parent being put into conflict by having the spouse identified as having abused the child (id.). In the suppression stage, the child's suppression may be internal only, a suppression of trauma, while external

sources, such as parents, may be telling the child to express rather than to recant the allegations (D34-35).

In contrast, Parul's age-inappropriate accurate sexual knowledge -- combined with her deciding that an incident described in explicit detail was a dream -- is "very characteristic" of intra-familial child sex abuse syndrome (E54-56, E60-61), particularly since children will not commonly have such a detailed recollection of a dream that occurred many months before (E60-61).

Often a child's initial reason for disclosure is to gain some protection so that the abuse is sure not to continue; but the child does not want this protection to take the form of actually harming the loved parent (E57-58). Parul directly expressed her fear that her

father would be put in jail (E56-57), and there had been a continuing order of protection, barring contact, which would itself prompt a child to "recant" (E60). Parul -- who had said that she loves her father (E38) -- had decided it was a dream after an upsetting and confusing court session (F4).

During his lengthy cross-examination, petitioner's counsel made numerous references to witnesses and events involved in the criminal sexual abuse proceeding against petitioner and to the incident in which the building superintendent allegedly sexually abused Parul (F15-20, F29-32, 30-33; H49-50).

The court then asked Dr. Lewittes if he was aware of information which he did not know when he formed an opinion. Dr. Lewittes observed "that there has been

hours of testifying in my opinion, by counsel about a lot of data and I had no awareness of and by sitting here hearing all about other children, other defendants, other cases, other validators" (H93-94, emphasis added), which was new to him. The witness said that if the information were true, it would be desirable to retain someone else as well to form another opinion (id.). However, Dr. Lewittes did not say that another validator would come to a different opinion (H94); indeed, even after having been "informed" by petitioner's counsel of his view of the case, Dr. Lewittes stated to the court that (H98-99).

> The answer to your question continues to be I do not feel that there is any more information that I need in order to continue to make the

> statements that were filed in the report, which I believe has been introduced into evidence, that report, I do not change my opinion that was stated in that report.

Asked by the court whether he believed another validation was required, Dr. Lewittes responded " I would have to answer that I do not understand the need for a further investigation of the child" (H99).

Petitioner's counsel nonetheless applied to the court for the appointment of an independent validator (H106-110, H146-147). Significantly, however, petitioner's counsel said that he would "absolutely not" consent to having the new validator interview petitioner (H146-147).

But the Commissioner did not object to a second validation, and the court in

fact said that if the attorneys agreed on a name it would authorize a second validator, acceding to petitioner's request (H148-151).

Petitioner's counsel then withdrew the application for another validation (H152-153).

Petitioner's counsel moved to dismiss at the close of the Commissioner's case on numerous grounds, including that the Commissioner had failed to establish a prima facia case (H155-169) and that the appropriate burden of proof in a sexual abuse proceeding would be clear and convincing evidence due to the stigma attached to an abuse finding (H163-164). However, on reconvening at the next hearing date, petitioner withdrew that motion (I1).

Contrary to his many previous representations about calling numerous witnesses to connect his lengthy hypothetical questions, and his demand for a Gujarti interpreter, and his request that the Court set aside the entire month of August for the presentation of his case (G13-19), petitioner then also rested, without taking the stand or calling a single witness (I1). Then, without any specificity as to grounds, petitioner made "all the appropriate motions at the end of my case" (I1-2).

FACT-FINDING DECISION OF THE FAMILY COURT

In a decision and order (one paper) entered October 12, 1990, the Family Court, Queens County (Edward Kaufman, F.C.J.), found that Parul was an abused

child within the meaning of section 1012(e)(iii) of the Family Court Act, in that petitioner committed against Parul Sexual Abuse in the Third, Second and First Degrees (respectively P.L. 130.55, 130.60, and 130.65).

After reviewing the evidence and applicable law in detail, the court observed (Petitioner's Appendix B at 13a-16a):

> Parul made out-of-court statements that her father had sexually abused her to her teacher, her principal, Ms. Gelber and Ms. Housen. Those initial statements were consistent (see Matter of Starr H., 156 A.D.2d 1024), and were before she was under pressure to recant. There is no suggestion of any motive on her part to falsely accused her father (Cf. Matter of Kimberly X., 133 A.D.2d 226 [evidence that child fabricated statements because of problems she was having at home and out of a desire to protect her natural father]). Nor is there

any evidence that Parul is psychologically disturbed (Cf. Matter of Linda E., 143 A.D.2d 904, app. den. 69 N.Y.2d 613 [child suffered from an undersocialized conduct disorder, evidenced in part by an excessive and precocious sexual preoccupation]), or that her parents are involved in a custody battle (Cf. Matter of Smith, 128 A.D.2d 784 [sexual abuse allegations made during pendency of volatile divorce proceedings]; see A. Rosenfeld, C. Nadelson & M. Krieger, Fantasy and Reality in Patients Reports of Incest, 40 J. Clin. Psychiatry 159 [1979]).

Parul's initially consistent out-of-court statements were persuasively corroborated by the expert "validation" testimony of Dr. Lewittes, who is an expert with the requisite ability to interpret behavior and information elicited from interviews within a conceptual framework for child sexual abuse. He was able to conclude that Parul's case is consistent with other cases of child victims of intra-familial sexual abuse. After careful evaluation, he was able to discount Parul's statements that a superintendent molested

her and that her original allegations were "dreams". These belated assertions by Parul, he concluded, are consistent with the "suppression stage" of the intrafamilial child sexual abuse syndrome. This stage of the syndrome, he testified, occurs when both inward pressure from the child and outward pressure from family members cause the child victim to "recant" the original allegations in order to reunite the family, protect a loved parent, and eliminate the fear and embarrassment associated with the intervention of outside agencies and the courts.

Dr. Lewittes' conclusions comport with clinical and scientific literature, which makes clear that many sexually abused children recant their original allegations (Myers, Bays, Becker, Berliner, Corwin & Saywitz, Expert Testimony in Child Sexual Abuse Litigation, 68 Neb. L. Rev. 1 (1969); Sgroi, Handbook of Clinical Intervention in Child Sexual Abuse at 24-27 [1982]). This happens so frequently that experts now consider recantation one aspect of the child sexual abuse syndrome

(Summit, The Child Sexual Abuse Accommodation Syndrome, 7 Child Abuse & Neglect 177 [1983]).

* * *

> Finally, Parul's initially consistent out-of-court statements are also corroborated by [petitioner's] statements to Ms. Gelber on April 7. While somewhat ambiguous, these statements provide additional assurance that Parul's out-of-court statements are reliable, and that the evidence as a whole supports a finding of sexual abuse.

The Court concluded that Parul was abused, making the appropriate sex offense findings required by section

1051(e) of the Family Court Act.[4]

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[4] A dispositional hearing was held on January 17, 1991. Luis Salinas, a caseworker with the Child Welfare Administration, conducted an investigation and report for the Family Court. His written report was admitted into evidence (J28). Mr. Salinas reported that Parul and her younger sister were presently living in India with close relatives. Mrs. P. informed him that she "believe[d] her daughter's story concerning sexual molestation" and had sent her daughter to India "because she did not want them to remain in the apartment with her husband" (J25; I&R at 2). Mrs. P. stated that she continued to reside with respondent "because she loves him" (J25; I&R at 2).

Petitioner did not take the stand or present any evidence.

At the conclusion of the hearing, the Family Court ordered that Parul be released to the custody of her mother. The Court also issued an order of protection directing that petitioner "is not to live with the child unless prior application to do so is made to the Family Court, and that the mother is not to permit the child to visit with the father unless the mother supervises such visitation" (J34). The Court stated that this requirement was intended to ensure that there would be "an opportunity to evaluate the propriety of such a return before the child is permitted to do that"

(continued...)

OPINION OF THE INTERMEDIATE STATE APPELLATE COURT

The Appellate Division, Second Department affirmed the order of the Family Court, stating that the finding of abuse by the father was supported by a preponderance of the evidence (Family Ct. Act § 1046[b][i]).

The Court noted that at the fact-finding hearing a social worker from the child's school and a caseworker assigned to investigate the allegations of abuse each testified to out-of-court statements made by the child detailing the sexual abuse by her father. The Court noted

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[4] (...continued)
after completion of a Mental Health study (J35). Petitioner did not challenge any aspect of that order on appeal to the Appellate Division, rather his challenge was solely to the fact-finding determination brought up for review by the dispositional order.

that each of the child's accounts of abuse were consistent with one another. Moreover, a psychologist, qualified as an expert in child sexual abuse, who interviewed the child, testified that the child's statements and behavior were consistent with the five stages of the inter-familial, child sex-abuse syndrome. The Court held that the validating evidence of the psychologist constituted sufficient corroboration of the child's statement to support the finding.

The Court considered petitioner's other arguments but found them to be without merit.

THE COURT OF APPEALS' DENIAL OF LEAVE TO APPEAL

On July 1, 1993, the New York Court of Appeals denied petitioner's motion for leave to appeal.

REASONS FOR DENYING THE WRIT

A. PETITIONER FAILED TO CHALLENGE THE EVIDENTIARY STANDARD IN THE COURTS BELOW. IN ANY EVENT, THE STATUTORY REQUIREMENT THAT A FINDING OF ABUSE BE BASED ON A PREPONDERANCE OF THE EVIDENCE FULLY COMPORTS WITH DUE PROCESS.

(1)

To the extent petitioner seeks review based on the evidentiary standard employed by the courts below to make a finding of abuse, he withdrew his motion raising the issue in Family Court and did not raise the issue on appeal to the Appellate Division and thus has not preserved it for this Court's review.[5] See Merrill v. Albany Medical Center

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[5] Petitioner impermissibly sought to raise this issue for the first time in a motion to reargue after the Appellate Division rendered its decision. The Appellate Division denied the motion. Thereafter, the Court of Appeals denied leave to appeal.

Hospital, 71 N.Y.2d 990, 529 N.Y.S.2d 272, 524 N.E. 2d 873 (1988); Morey v. Sings, 174 A.D.2d 870, 871 (3d Dept. 1991); Lamphear v. State, 91 A.D.2d 791, 458 N.Y.S.2d 71 (3rd Dept. 1982); In re Colin R., 63 Md. App. 684, 493 A. 2d 1083, 1088 (1985).

(2)

In any event, the statutory requirement that a finding of abuse be based on a preponderance of the evidence, rather than on clear and convincing evidence, affords due process, and is fully consistent with this Court's precedents.

New York's statutory scheme contained in Article 10 of the Family Court Act establishes a two-step procedure to identify and protect abused or neglected children. First, there is a

fact-finding hearing at which abuse or neglect must be established by a preponderance of the evidence (Family Ct. Act § 1012[e],[f]; § 1046[b][i]. If a child is determined to be abused or neglected, the court must thereafter hold a dispositional hearing to determine what order of disposition should be made (Family Ct. Act § 1045).[6]

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[6] Among the dispositional options is placement out of the home for a period of one year, subject to extension for additional periods of one year each (Family Ct. Act § 1055[b]). In this case, the child victim was not even placed outside the home. Rather, in the order of disposition, custody was awarded to the mother, Anilia P., and the order directed that petitioner not visit the child without the supervision of Anila P. and prohibited him from residing in the same household as the child "unless prior application to do so is made in the Family Court." The Court reached this resolution upon being advised that the child's mother had chosen to send Parul to live with close relatives and wanted to ensure that the Court would have the

(continued...)

Petitioner, citing Santosky v. Kramer, 455 U.S. 745 (1982), contends that the fact-finding hearing was constitutionally infirm because the Family Court did not apply a standard of clear and convincing evidence. In Santosky, this Court addressed the burden of proof constitutionally required at the fact-finding stage in a permanent neglect proceeding held pursuant to Article 6 of the Family Court Act. This Court held that "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support

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[6] (...continued)
opportunity to assess the situation upon her return. See n. 3, pp. 43-44. Upon information and belief, petitioner has never sought relief before the Family Court. See Family Ct. Act (respondent entitled to move to modify, set aside or vacate order at any time).

its allegations by at least clear and convincing evidence" (455 U.S. at pp. 747-748).

However, Article 10 proceedings differ fundamentally from Article 6 proceedings and thus the same conclusion is not mandated here.

As this Court noted in Santosky, determining how much process is due involves balancing "the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure" Santosky v. Kramer, 455 U.S. at 754.

The New York Court of Appeals applied this balancing test in In re Tammie Z., 66 NY2d 1, 494 N.Y.S.2d 686, 484 N.E.2d 1038 (1985), and held that the

provision of Family Court Act § 1046(b) that a finding of neglect must be based on a preponderance of the evidence "affords due process under the federal Constitution". 66 N.Y. 2d at 3.[7]

In holding that the balancing of interests here differs materially from Santosky, the Court of Appeals noted that while a neglect proceeding pursuant to Article 6 may result in permanent termination of parental rights, under Article 10 the placement is only temporary.

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[7] While that case involved neglect, the reasoning applies with equal force to cases finding abuse. Indeed, the courts have expressly applied the same analysis to abuse cases. In re Katrina W., 171 A.D.2d 250, 575 N.Y.S.2d 705 (2d Dept. 1991), app. dsmd. 79 N.Y.2d 976, 583 N.Y.S.2d 194, 592 N.E.2d 802, cert. den. sub. nom., Rosalyn W. v. Suffolk County Dept. of Social Services, __U.S.__, 113 S. Ct. 217, 121 L.Ed. 2d 156 (1992).

The Court of Appeals also found a fundamental difference relating to the risk of error. In an Article 6 termination proceeding, the child has been in the care of an authorized agency for a period of more than one year and even if a termination proceeding fails for lack of proof, "'a judge has ample discretion to ensure that ... a child will not return to a hostile environment'" In re Tammie Z., 66 N.Y.2d at 687, quoting Santosky v. Kramer, 455 U.S. at p. 766, n. 16, by issuing orders extending foster home placement. Accordingly, "'[f]or the child the likely consequence of an erroneous failure to terminate is preservation of an uneasy status quo'" Id. quoting Santosky, 455 U.S. at 765-766.

However, the Court of Appeals noted that in Article 10 proceedings, an erroneous failure to place the child may have "disastrous consequences." Id. Pursuant to Family Court Act § 1051[c], if abuse or neglect is not proved, the court must dismiss the petition. While temporary placement or protection may be ordered (Family Ct. Act § 1027[a]), that placement or protection remains in effect only pending a final order of disposition, at which time the child is returned to the parents. Id.

Thus, the Court of Appeals properly concluded that in Article 10 proceedings, a finding based on a preponderance of the evidence fully comports with due process. Other jurisdictions which have considered the issue are in accord. See e.g., Raboya v. Shrybman & Associates, 777 F.

Supp. 58, 60 (D.C. 1991) ("[B]ecause the statutory scheme for child neglect involves at most a temporary suspension of parental rights, due process only requires that a finding of neglect be based on a preponderance of the evidence"); In re N.H., 569 A.2d 1179, 1181-1183 (D.C. App. 1990); Delahunty v. Hawaii, 677 F. Supp. 1052, 1057 (D. Haw. 1977); In re J.K., 49 Wash. App. 670, 745 P.2d 1304, 1306 (1987); In re Colin R., 63 Md. App. 684, 693, 493 A.2d. 1083, 1089 (1985); In re O.E.P., 654 P.2d 312, 315-17 (Colo. 1982) (en banc); In re K.B., T.B., and S.B., 302 N.W.2d 410, 411 (S.D. 1981); see also, Rivera v. Minnich, 483 U.S. 574 (1987) (Pennsylvania's preponderance standard for determining paternity is constitutionally permissible).

B. PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL. THERE IS NO BASIS IN LAW OR THE RECORD FOR PETITIONER'S MERITLESS CONTENTIONS THAT HIS RIGHTS WERE VIOLATED BECAUSE THE ABUSE PETITION WAS INDEFINITE AS TO WHEN HE ABUSED THE CHILD OR THAT HE WAS DEPRIVED OF REQUIRED DISCOVERY MATERIAL.

Petitioner fatally fails to distinguish proceedings under Article 10 of the Family Court Act from criminal proceedings governed by the Criminal Procedure Law. As the Court of Appeals has reiterated, "a child abuse or neglect proceeding under Article 10 of the Family Court Act is a civil proceeding for the protection of the child alleged to be abused or neglected," not a criminal proceeding. People v. Smith, 62 N.Y.2d 306, 309, 311-316, 476 N.Y.S.2d 797, 465 N.E.2d 336 (1984) (filing Article 10 petition does not trigger accused's right to counsel with respect to a criminal

charge arising from the same facts; and, unlike a criminal proceeding, right to counsel may be waived in the absence of counsel). "Because the accused parent is not subject to criminal sanctions in a child protective proceeding, the Legislature has provided that the usual rules of criminal evidence do not apply." In re Nicole V., 71 N.Y.2d 112, 117, 524 N.Y.S.2d 19, 518 N.E.2d 914 (1987).

Thus, unlike criminal proceedings, the exclusionary rule does not apply to Article 10 proceedings. In re Diane P., 110 A.D.2d 354, 494 N.Y.S.2d 881 (2d Dept. 1985), app. dsmd., 67 N.Y.2d 918, 501 N.Y.S.2d 1027, 492 N.E.2d 1235 (1986). Unlike criminal proceedings, the respondent's failure to testify allows the fact-finder "to draw the strongest inference against [him] that the opposing

evidence in the record permits". In re Tammy L., 132 Misc.2d 722, 723, 504 N.Y.S.2d 1011 (Fam. Ct., Onondaga Co. 1986), quoting Commissioner of Social Services v. Phillip DeG., 59 N.Y.2d 137, 141, 463 N.Y.S.2d 761, 450 N.E.2d 681 (1983). The preponderance of the evidence is sufficient to justify a finding, rather than a conclusion beyond a reasonable doubt. In re Tammie Z., 66 N.Y.2d 1, 494 N.Y.S.2d 686, 484 N.E.2d 1038 (1985). The unsworn testimony of minors is permitted, In re Elizabeth D., 139 A.D.2d 66, 530 N.Y.S.2d 397 (4th Dept. 1988), app. dsmd. 73 N.Y.2d 871, 537 N.Y.S.2d 495, 534 N.E.2d 334 (1989), as, of course, is certain hearsay, Nicole V., supra. Parents may be required to proceed in an expeditious Family Court proceeding necessary to protect the

child, rather than hold it in abeyance, even against their claim that their Family Court testimony will prejudice their defense of a subsequent criminal proceeding. In re Germaine B., 86 A.D.2d 847, 447 N.Y.S.2d 448 (1st Dept. 1982). And, as is well settled, a respondent may be excluded during the child's testimony. In re Donna K., 132 A.D.2d 1004, 518 N.Y.S.2d 289 (4th Dept. 1987).

It is only by wholly ignoring this settled body of law that petitioner is able to contend that his rights were violated because he was denied Brady material and that he was prejudiced in his defense by lack of a narrow time frame in the petition.

Both contentions also ignore the distinct statutory provisions that apply. Unlike an Article 10 petition, which

requires the allegation only of "facts sufficient to establish that a child is an abused or neglected child," see Fam. Ct. Act, § 1031(a), an indictment must allege where, when and what the defendant did. See C.P.L. 200.50; People v. Morris, 61 N.Y.2d 290, 293-295, 473 N.Y.S.2d 769, 461 N.E.2d 1256 (1984); People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790, 502 N.E.2d 577 (1986).

Notably, even in a criminal proceeding an otherwise fatal indefiniteness as to time in an indictment may be cured by a response to a Bill of Particulars. Morris, supra, 61 N.Y.2d at 293. Article 10 of the Family Court Act simply carries this several steps further: it contemplates the possibility of full discovery unavailable under the C.P.L. Indeed, section 1038 of

the Family Court Act authorizes use of every discovery measure available under Article 31 of the C.P.L.R., unless otherwise proscribed in Article 10. Thus, in view of the opportunity for civil discovery, there is no basis for applying the Brady rule developed in the context of criminal proceedings in which discovery is far more circumscribed.

Similarly, the purpose behind the requirement that indictments be definite -- "to provide the accused with fair notice of the charges against him" and "to enable him to answer to the charges and to prepare an adequate defense" (People v. Keindl, supra, 68 N.Y.2d at 416) -- is accomplished in Article 10 through different means: far broader discovery than the C.P.L. permits. There is no basis for applying to this civil

proceeding the distinct definiteness requirements specifically required by the C.P.L., which have no counterpart in the Family Court Act.

Indeed, there is substantial reason not to do so. As described above, the very nature of intra-familial sexual abuse may result in substantial time having passed before disclosure is made and proceedings are brought. Because of the lapse of time, the child's natural difficulty in placing an event in time should not be, per se, the death knell of a court's opportunity to make sure that the purposes of Article 10 are being achieved, if other evidence sufficiently supports the finding that the child has been sexually abused, and the aid of the court is required to protect a child otherwise totally without refuge, to

monitor the situation, and to provide counseling and other services to the parent and the family. This is not to say that a child's failure to be specific is wholly irrelevant; instead, any indefiniteness should go to weight of the evidence rather than bar intervention to protect a child as to whom a prima facie case of sexual abuse is made out. See In re Theresa C., 121 Misc.2d 15, 19-22, 467 N.Y.S.2d 148 (Fam. Ct., Monroe Co. 1983) (a petition for a finding of child abuse is not insufficient merely because it relies upon year-old claims).

Concerning petitioner's supposed prejudice, it is worth reiterating that the court gave petitioner's counsel the opportunity for access to the Commissioner's file, and permitted full cross-examination concerning the dates of

the occurrence.[8] There is not the slightest evidence in the record that he was prejudiced: indeed, petitioner did not even take the stand to establish an evidentiary basis for innocence by alibi, let alone innocence at all. In this regard, it is important to note that, contrary to his assertions, petitioner was never denied a Gujarti interpreter for witnesses he purportedly intended to call. Rather, the Court advised

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[8] Petitioner's contention that he was denied exculpatory information has no basis in the record; it is sheer speculation. Further, undercutting it are the facts -- omitted by him here -- that he was granted the opportunity to examine DSS's entire case file: that he succeeded in having the tape he sought delivered to the judge in the criminal proceeding; and that he failed to take any steps to enforce his purported attempts to get this information in the Family Court proceeding or to vigorously pursue the ample discovery that the Family Court Act permits (see section 1038).

petitioner's counsel that he could make the request at the appropriate time (G: pp. 18-19). He never did so. In any event, if petitioner's case were prejudiced it would be because he failed to use existing discovery devices, or to make any reasonable effort at all to rebut the substantial prima facie case presented against him. His failings are hardly a reason to import into his civil proceeding strictures applicable only to criminal proceedings governed by different statutes with distinct purposes.

In sum, petitioner received a full opportunity to oppose the petition against him, and nonetheless failed to rebut the strong prima facie case that he sexually abused his daughter, Parul. The procedural claims he raises, without any

basis in the record or applicable law, are meritless.

For all the above-stated reasons, the petition fails to present any issue warranting review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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